under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

STATEMENT

Petitioner's complaint, filed on December 18, 1961, alleged that on July 13, 1959, petitioner, then nine years old, was injured when struck by a truck operated by United States Navy personnel in the residential section of the Mare Island Naval Shipyard, California. Alleging that his injuries were caused by the negligence of agents of the United States, he sought judgment in excess of $350,000 against the government.

The United States moved to dismiss on the ground that the action was barred by the Federal Tort Claims Act's two-year statute of limitations, 28 U.S.C. 2401 (b) (*supra*, p. 3). Petitioner opposed the motion on the grounds that his claim did not accrue until the appointment of his guardian *ad litem* and that the United States was estopped from invoking Section 2401(b) as a defense. In an affidavit filed in support of the latter contention, petitioner's attorney alleged that the complaint was not filed earlier because petitioner's father and guardian *ad litem* did not wish to jeopardize his chances for promotion to Captain in the Navy and because petitioner's attorney relied on a statement by an undisclosed Assistant United States Attorney in Los Angeles that the applicable statute of limitations did not apply to minors (Pet. App. 5, 10).

In granting the motion to dismiss (Pet. App. 12-13), the district court noted that the provision for

tolling during disability in 28 U.S.C. 2401(a) (*supra*, pp. 3-4) did not apply to the Tort Claims Act and held that the time period of 28 U.S.C. 2401(b) was not tolled by minority (Pet. App. 9-10). The court also held that the affidavit filed by petitioner's attorney did not present facts sufficient to estop the United States from raising Section 2401(b) as a defense (Pet. App. 10-11).

The court of appeals affirmed (Pet. App. 7), holding that the cause of action belonged to the minor plaintiff and not to his guardian *ad litem* and that the claim accrued at the time of the injury (Pet. App. 2-3). In so doing, the court noted that the claims of minors against the United States are, in the overwhelming majority of cases, presented in a timely fashion (Pet. App. 3) and relied in part upon the congressional policy against entertaining stale tort claims which underlies Section 2401(b) (Pet. App. 4). In addition, the court rejected petitioner's constitutional claims, and held that he could not successfully rely on a waiver of time limitation or a mistake of law by an Assistant United States Attorney (Pet. App. 4-5).

ARGUMENT

The decisions below, holding that the Federal Tort Claims Act's statute of limitations, 28 U.S.C. 2401(b), bars an action by a minor for injuries which occurred more than two years before the complaint was filed, are in accord with the language and purpose of the statute and with prior appellate decisions. There is no occasion for review by this Court.

In contrast with the statute of limitations applicable to claims against the United States under the Tucker Act (28 U.S.C. 2401(a))—which expressly provides for tolling during periods of legal disability—Section 2401(b) unequivocally states that a "tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues." The absence of any tolling provision for legal disability, coupled with the congressional policy against making the United States subject to stale tort claims,[1] make it clear, we believe, that Congress did not intend the tort statute of limitations to be tolled during minority. Every appellate court which has passed on this point has so held. Thus in *United States* v. *Glenn*, 231 F. 2d 884 (C.A. 9), certiorari denied, 352 U.S. 926, and *Simon* v. *United States*, 244 F. 2d 703 (C.A. 5), the courts held that the disability tolling provision of 28 U.S.C. 2401(a) is not applicable to the limitations period under Section 2401(b).[2] And in *Sgambati* v. *United States*, 172

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[1] It is significant that in no statute dealing with governmental tort liability and the time limitations thereon has Congress included a provision for tolling for disability. See Suits in Admiralty Act, 47 Stat. 420, 46 U.S.C. 745; Public Vessels Act, 43 Stat. 1112, 46 U.S.C. 782. Specifically, as to the Federal Tort Claims Act, see H. Rep. No. 1754, 80th Cong., 2d Sess., p. 4; Hearings on H.R. 7236 Before Subcommittee No. 1 of the House Committee on the Judiciary, 76th Cong., 3rd Sess., p. 21. Petitioner refers to these documents as House Resolutions (Pet. 22-23).

[2] The district court decisions appear to be in accord with these decisions. See *Morton* v. *United States*, 185 F. Supp. 211 (E.D. Ill.). See also *Whalen* v. *United States*, 107 F. Supp. 112 (E.D. Pa.); *Foote* v. *Public Housing Commissioner*

F. 2d 297 (C.A. 2), certiorari denied, 337 U.S. 938, the court held that infancy does not toll the statute of limitations for suits against the United States for maritime torts.[8] As this Court noted in refusing to rule that the statute of limitations on claims for just compensation was tolled by war, "[L]imitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Soriano* v. *United States*, 352 U.S. 270, 276.

Petitioner's contention that a claim does not accrue within the meaning of Section 2401(b) until majority or the appointment of a guardian *ad litem* (Pet. 42-50) is without merit. In effect, this contention is merely another form of the argument—which we have shown has been uniformly rejected—that minority tolls the time period in Section 2401(b). Moreover, as this Court ruled in *Reading Co.* v. *Koons*, 271 U.S. 58, the question of accrual is to be resolved on the basis of practicalities. There, the Court held that a wrongful death action under the Federal Employers' Liability Act accrued at the time of death rather than the time an administrator was appointed, even though the action must be brought by the administrator. As

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of United States, 107 F. Supp. 270 (W.D. Mich.); *Morgan* v. *United States*, 143 F. Supp. 580 (D. N.J.); *Levitch* v. *United States*, 114 F. Supp. 572 (W.D. Mo.); *Finn* v. *United States*, 152 F. Supp. 721 (E.D. N.Y.); *Lomax* v. *United States*, 155 F. Supp. 354 (E.D. Pa.).

[8] See also *Osbourne* v. *United States*, 164 F. 2d 767 (C.A. 2); *Williams* v. *United States*, 228 F. 2d 129 (C.A. 4), certiorari denied, 351 U.S. 986.

in *Koons*, in this case there were identifiable persons who could have "start[ed] the machinery of the law in motion to enforce" petitioner's rights at the time of his injury (271 U.S. at 62). Petitioner's father, who appears to have taken all the necessary steps preliminary to filing suit within two years of the injury (Pet. 14-15), could have easily secured his appointment as guardian *ad litem* within the two-year period provided in Section 2401(b). Moreover, a timely suit could have been filed on petitioner's behalf by a next friend, without the formal appointment of a guardian *ad litem*.[4]

Petitioner also contends that the question of when a claim accrues within the meaning of 28 U.S.C. 2401 (b) is determined by reference to State, rather than federal, law (Pet. 32-48). This question, however, is academic, for under California law, petitioner's tort claim accrued at the time of the injury. See, *e.g.*, *Petrucci* v. *Heidenreich*, 43 Cal. App. 2d 561, 562, 111 P. 2d 421, 422; *Wetzel* v. *Pius*, 78 Cal. App. 104, 107, 248 Pac. 288, 289.[5] The argument that the California law tolling that State's statute of limitations during minority should be read into 28 U.S.C. 2401 (b) is without support[6] or substance. The authorities

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[4] Fed. R. Civ. P. 17(c). The functions of a next friend and guardian *ad litem* are precisely the same. 3 Moore, *Federal Practice* ¶ 1726, p. 1421 (2d ed.).

[5] It should be noted that California Code of Civil Procedure § 352, providing for tolling of the statute of limitations for disability, expressly contemplates that a cause of action has "accrued" in favor of the disabled person.

[6] There is a split of authority on the question whether State or federal law governs the definition of the legal wrong for

previously cited (*supra*, pp. 6-7) for the proposition that Section 2401(b) is not qualified by tolling provisions drawn from Section 2401(a) or implied from common law principles likewise require that the statute not be qualified by tolling provisions taken from State law.

Finally, petitioner contends that his complaint, although sounding in tort, sets forth a contract claim and was therefore timely under 28 U.S.C. 2401(a) (six years) (Pet. 66-69). But the complaint sets forth no facts upon which relief could be granted under a contract theory of recovery. In any event, since the complaint seeks a judgment far in excess of $10,000, the district court would lack jurisdiction were the action viewed as raising a contractual claim. See 28 U.S.C. 1346(a).

2. Petitioner argues that his father's conflict of interests and the alleged misrepresentation of law by an Assistant United States Attorney estop the government from raising the two-year bar of Section 2401(b) (Pet. 46-48, 76-82).[7] But as the court below

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purposes of determining the starting point for computing the two-year period under Section 2401(b). See *Kossick* v. *United States*, 330 F. 2d 933 (C.A. 2); *Quinton* v. *United States*, 304 F. 2d 234 (C.A. 5); *Hungerford* v. *United States*, 307 F. 2d 99 (C.A. 9); *Carnes* v. *United States*, 186 F. 2d 648 (C.A. 10); *Tessier* v. *United States*, 269 F. 2d 305 (C.A. 1). None of these cases suggest, however, that a State tolling provision may be applicable as a qualification on the federal tort claims statute of limitations.

[7] Petitioner's reliance on *Glus* v. *Brookyln Eastern District Terminal*, 359 U.S. 231, is misplaced, as that case did not involve an action against the United States.

correctly held, *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, and *Munro* v. *United States*, 303 U.S. 36, "simply preclude successfully relying on a waiver of the time limitation or a mistake of the government attorney on the applicable law" (Pet. App. 5).[8]

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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JOHN W. DOUGLAS,
Assistant Attorney General.

DAVID L. ROSE,
Attorney.

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[8] Petitioner also appears to argue that the failure to toll the tort claims statute of limitations during minority amounts to a denial of equal protection of the laws to minors and that it is a violation of the due process clause for the United States to condition its waiver of sovereign immunity differently from the State in which petitioner's claim arose (Pet. 32-34, 69-76, 82-85). We submit that these, and various other constitutional contentions appearing in the petition, are patently insubstantial.

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